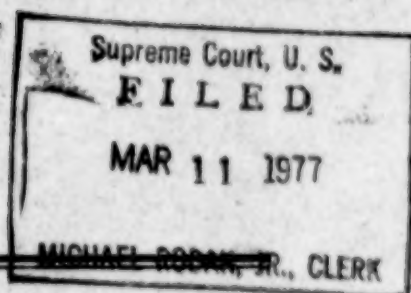


**APPENDIX**



**In the Supreme Court of the United States**  
OCTOBER TERM, 1976

\_\_\_\_\_  
**No. 76-835**  
\_\_\_\_\_

UNITED STATES OF AMERICA,  
*Petitioner*

v.

NEW YORK TELEPHONE CO.  
\_\_\_\_\_

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI FILED  
DECEMBER 20, 1976  
CERTIORARI GRANTED JANUARY 25, 1977**

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Judge Charles H. Tenney, Southern District of New York, of February 19, 1976, the interception of wire communications through New York telephone number (212) 877-4425, subscribed to by GEORGE VLACHOS, and located in Apartment 1-I, at 344 West 72nd Street, New York, New York, was conducted by Special Agents of the Federal Bureau of Investigation. The affidavit of Special Agent Richard W. Keifer in support of United States District Court Judge Tenney's order is therefore attached to this affidavit as Exhibit A and is hereafter incorporated by reference. The interceptions of wire communications conducted, pursuant to Judge Tenney's order, have provided the affiant with probable cause to believe that during the period of interception from February 19, 1976 through March 8, 1976:

(a) MITCHELL DRUCKER, EUGENE MASSAR, and DON (Last Name Unknown) interchangeably used New York telephone number (212) 877-4425 to receive an average of 70 separate gambling related telephone conversations each day, and to receive an average of \$19,000 each day in gambling wagers.

(b) During the aforementioned period of interception, no outgoing calls were made through New York telephone number (212) 877-4425.

(c) MITCHELL DRUCKER, EUGENE MASSAR, and DON (Last Name Unknown) have also used New York telephone number (212) 595-6849, subscribed to by MARY M. DEWAN, and also located in Apartment 1-I at 344 West 72nd Street, New York, New York, to conduct an illegal gambling enterprise and further, New York telephone number (212) 595-6849 was employed by MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, to transmit gambling information by making outgoing calls to associates and confederates in furtherance of the conspiracy to violate Title 18, United States Code, Section 1952, and in violation of Title 18, United States Code, Section 371.

5. Physical surveillances conducted by Special Agents of the Federal Bureau of Investigation during the interception period at 314 West 72nd Street, revealed MITCHELL DRUCKER and EUGENE MASSAR to enter these prem-

ises between 5:15 PM and 5:25 PM, and to exit these premises between 8:10 PM and 8:15 PM on weekdays, and revealed MITCHELL DRUCKER and EUGENE MASSAR to enter these premises between 11:15 and 11:40 AM and exit the premises between 8:10 and 8:15 PM on Saturdays, and further, revealed EUGENE MASSAR and DON (Last Name Unknown) to enter these premises between 11:15 and 11:45 AM and exit these premises between 2:00 and 2:30 PM on Sundays.

6. Physical surveillances conducted by Special Agents of the Federal Bureau of Investigation at 344 West 72nd Street failed to reveal either EUGENE MASSAR or MITCHELL DRUCKER entering or existing these premises on or after March 11, 1976.

7. Physical surveillances conducted by Special Agents of the Federal Bureau of Investigation in the vicinity of 220 East 14th Street, revealed the following activities on the dates indicated:

<i>Date/Time</i>	<i>Individual</i>	<i>Activity</i>
March 11, 1976 5:15 PM	EUGENE MASSAR and MITCHELL DRUCKER	Observed on 14th Street between Second and Third Avenue.
March 16, 1976 5:19 PM	EUGENE MASSAR and MITCHELL DRUCKER	Enter 220 East 14th Street
8:11 PM	EUGENE MASSAR, MITCHELL DRUCKER, and unidentified white male	Exit 220 East 14th Street
March 17, 1976 5:20 PM	EUGENE MASSAR, and MITCHELL DRUCKER	Enter 220 East 14th Street
8:11 PM	EUGENE MASSAR, MITCHELL DRUCKER, and unidentified white male	Exit 220 East 14th Street

(a) The unidentified white male referred to above has been described as being 20 to 25 years of age, 5'8" to 5'10"; slender build, curly brown hair, sharp features.

8. Source A advised Special Agent William P. Flynn on March 16, 1976, that the operation utilizing New York telephone number (212) 877-4425 had re-located and was cur-



rently receiving line information and wagers through New York telephone number (212) 533-1927.

(a) Source A has furnished information pertaining to illegal gambling business in the New York City area on more than 40 occasions since May of 1972.

(b) Information provided by Source A has resulted in the approval and execution of a New York State search warrant and two Federal orders to intercept wire communications involving illegal gambling operations, including the interception approved by United States District Judge Tenney, the affidavit in support of which is attached hereto.

(c) Source A referred to in this affidavit is unwilling to testify against NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown concerning this gambling operation because of the probability of retaliation and fear of physical harm.

9. Special Agent Frank J. Meyers was advised by the New York Telephone Company on March 16, 1976, of the identity of the subscriber to the following telephone numbers:

(212) 533-1927	T. HAMILTON 220 East 14th Street New York, New York
(212) 674-2667	T. HAMILTON 220 East 14th Street New York, New York

THEREFORE, the affiant submits that the information obtained through the interception of wire communications to and from New York telephone number (212) 877-4425, pursuant to the order of United States District Court Judge Charles H. Tenney, Southern District of New York, on February 19, 1976, and the information developed in the course of the investigation as set forth in all the preceding paragraphs and the affidavit of Richard W. Keifer, appended hereto as Exhibit A, provides sufficient facts to establish that NICHOLAS R. TORETTO, HOWARD

WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, have been, are, and will continue to commit offenses involving the use of New York telephone numbers (212) 533-1927 and (212) 674-2667, subscribed to by T. HAMILTON and located at 220 East 14th Street, as an integral part of a continuing conspiracy to conduct an illegal gambling enterprise in violation of Sections 1952 and 371 of Title 18, United States Code.

WHEREFORE, the affiant respectfully requests that an order issue, authorizing the affiant and other Special Agents of the Federal Bureau of Investigation to place pen registers or similar mechanical devices on the telephones bearing numbers (212) 533-1927 and (212) 674-2667, subscribed to by T. HAMILTON and located at 220 East 14th Street, New York, New York, until such time as the telephone numbers of all outgoing calls dialed lead to the identities of the associates and confederates of NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, and to the location of other places of operation, or until the expiration of twenty (20) days from the date of this order, whichever is earlier.

/s/ Walter F. Smith  
WALTER F. SMITH  
Special Agent  
Federal Bureau of  
Investigation

Subscribed and sworn to before me  
this 19 day of March, 1976  
/s/ Charles H. Tenney  
UNITED STATES DISTRICT  
JUDGE

[Exhibit A omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE

Misc. No. 19-97 (44)

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investiga-  
tion, United States Department of Justice

Affidavit having been made before me by Walter F. Smith,  
Special Agent of the Federal Bureau of Investigation,  
United States Department of Justice, and full consideration  
having been given to the matters set forth therein the court  
finds:

- (a) there is probable cause for belief that NICHOLAS  
R. TORETTO, HOWARD WILLIAM GOLDMAN,  
MITCHELL DRUCKER, EUGENE MASSAR, DON  
(Last Name Unknown), and others as yet unknown have  
committed, are committing, and will continue to commit  
offenses listed in Section 2516 of Title 18, United States  
Code, involving the use of facilities in interstate com-  
merce in order to promote, manage, establish and carry  
on an unlawful activity, to wit: a gambling enterprise  
in violation of Section 1952 of Title 18, United States  
Code, and are conspiring to commit such an offense in  
violation of Section 371 of Title 18, United States Code;
- (b) there is probable cause to believe that the telephones  
subscribed to by T. HAMILTON, and located at 220  
East 14th Street, New York, New York, and bearing  
telephone numbers (212) 533-1927 and (212) 674-2667,  
have been, are being, and will continue to be used by  
MITCHELL DRUCKER, EUGENE MASSAR, DON  
(Last Name Unknown), and others as yet unknown in  
commission of the above described offenses.

WHEREFORE, it is hereby ordered that the New York  
Telephone Company, a communication carrier as defined  
in Section 2510 (10) of Title 18, United States Code, shall  
furnish the applicant forthwith all information, facilities  
and technical assistance necessary to accomplish the inter-  
ception unobtrusively and with a minimum of interference  
with the service that such carrier is according the person  
whose communications are to be intercepted, the furnishing  
of such facilities or technical assistance by the New York  
Telephone Company to be compensated for by the applicant  
at the prevailing rates.

WHEREFORE, it is further ordered that Special Agents  
of the Federal Bureau of Investigation, United States De-  
partment of Justice, are authorized to:

- (a) install mechanical devices on the telephones sub-  
scribed to by T. HAMILTON, and located at 220 East  
14th Street, New York, New York, and bearing telephone  
numbers (212) 533-1927 and (212) 674-2667, which tele-  
phones have been, are being, and will continue to be  
used at said address.
- (b) operate such mechanical device until the telephone  
numbers of all outgoing calls dialed lead to the identities  
of the associates and confederates of NICHOLAS R.  
TORETTO, HOWARD WILLIAM GOLDMAN, MIT-  
CHELL DRUCKER, DON (Last Name Unknown), and  
EUGENE MASSAR, and their places of operation, or  
for a period of twenty (20) days from the date of this  
Order, whichever is earlier.

Provided that the operation of this device must terminate  
upon attainment of the authorized objective, or in any  
event, at the end of twenty (20) days from the date of this  
Order.

Dated: March 19, 1976

/s/ Charles H. Tenney  
UNITED STATES DISTRICT  
JUDGE



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE:

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

ORDER TO SHOW CAUSE  
WITH A STAY  
Misc. No. 19-97(44)

Upon the annexed affidavits of FRANK R. NATOLI and WILLIAM F. McGARTY, duly sworn to the 30th day of March, 1976, and upon motion of GEORGE E. ASHLEY, attorney for the New York Telephone Company, it is hereby Ordered, that

WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, show cause before this Court at a Term for Motions to be held in Room 1105 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 31st day of March, 1976, at 3:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the order of this Court dated March 19, 1976, directing the New York Telephone Company to furnish Special Agents of the Federal Bureau of Investigation with all information, facilities (including lease lines) and technical assistance necessary to effectively utilize a pen register, should not be vacated, and why such other and further relief as to this Court may seem just and proper should not be granted.

Sufficient reason appearing therefor, it is

ORDERED that sufficient notice of this application shall be deemed to have been given if service of a copy of this Order to Show Cause and the papers upon which it was granted, is made at or before 4:00 P.M. on the 30th day of March, 1976, personally on WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized

Crime and Racketeers for the Southern District of New  
York, at St. Andrews Plaza, New York, N.Y.

Dated: New York, New York  
March 30, 1976

/s/ CHARLES H. TENNEY  
U.S.D.J.

[Paragraph in Order to Show Cause which would have  
stayed the pen register order was stricken by Judge Ten-  
ney]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

Misc. No. 19-97(44)

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

FRANK R. NATOLI, being duly sworn, deposes and says:

1. I am employed by New York Telephone Company as an Attorney in the Legal Department, Litigation Section. From time to time during my career in the Legal Department, I have been involved in matters concerning our Security Division and its liaison with law enforcement agencies. I am fully familiar with the facts and prior proceedings herein and make this affidavit in support of Telephone's motion to modify or vacate this Court's order of March 19, 1976, made and entered in this proceeding.

2. Subsequent to March 19, 1976, I was informed by Kenneth J. Lucey, General Litigation Attorney, that a Special Agent of the Federal Bureau of Investigation, United States Department of Justice ("FBI"), had secured an order of this court to place a pen register on certain telephone numbers in the City of New York. I was further advised that Telephone had been served with said order on March 24, 1976, and that it might be necessary for Telephone to appear in Court to modify or quash the said order.

3. I contacted William F. McGarty, Security Supervisor of Telephone who informed me that Telephone had, after the receipt of the order of March 19, 1976, (annexed hereto as Exhibit I), supplied the FBI with appearance information and/or terminal locations as was orally requested by the FBI Agent.

4. It must be noted that Telephone is further willing to provide the FBI with all information concerning the necessary pair and cable. Once this information is fur-

nished, the FBI will have the *full* capacity to install a pen register without further assistance of Telephone.

5. The order, however, further directed Telephone to furnish the FBI with facilities which, in common parlance of Telephone terminology, includes lease lines and technical assistance in order to facilitate the installation of a pen register on the subject telephone lines. It is the position of the New York Telephone Company that facilities and technical assistance may only be furnished to law enforcement officials under a Title III application, pursuant to § 18 U.S.C.A., §§ 2510 *et seq.* (1970) (hereinafter, "Title III"). This section requires a company such as Telephone to provide whatever technical assistance is necessary in order to permit the Government to install electronic surveillance equipment on telephone lines. Telephone has on several occasions in the past complied with numerous Title III court orders, but has not to my knowledge, furnished said assistance in non-Title III applications.

6. It must be pointed out that although the caption of the order indicates the Government is requiring facilities to install a pen register, the body of the order is worded in such a fashion that it directs Telephone to furnish the FBI with the capability to perform an *interception*. It is unquestioned that any order directing the interception of communications must be obtained under Title III. It is clear that the instant order was *not* obtained pursuant to the provisions of Title III. It is a jurisdictional requirement that a Title III order contain the prior approval of the Attorney General or a designated Assistant Attorney General, 18 U.S.C.A. § 2518. On its face the order is void since it does not have such prior approval contained therein. Further, the Court is without authority to compel any *interception* of communications without a valid Title III application. Accordingly, the instant order was not issued under Title III. Therefore, the Court cannot look to that statute for its authority to issue the present order.

7. It may be contended that the Court had authority to issue the order pursuant to F. R. Cr. P. 41. This position is similarly untenable. Rule 41 is a codification of the Fourth Amendment to conduct a search and the Court may only authorize a civil officer or other federal law official to effect the search. Rule 41 cannot be construed to compel a



private party (Telephone) to actively assist in conducting a search during a criminal investigation. Rule 41 does not authorize the Court to deputize Telephone and it applies only to law enforcement authorities. Further, Rule 41 provides for the search and seizure of "tangible" objects. It is seriously doubted that electronic pulses or tones registered by a pen register can be considered "tangible" within the meaning of that Rule.

7. Under the procedure of Rule 41 there must be an execution and a return within 10 days. This order provides for 20 days. Upon the seizure of the property, a receipt is required to be given and an itemized inventory must be made. All of these elements appear lacking in this case. Therefore, Rule 41 does not appear to be the basis for granting the Court jurisdiction to issue the order herein to Telephone.

8. The All Writs Statute cannot confer jurisdiction when the Court has none. Said statute is a non-jurisdictional one. Hence, before the Court may utilize that statute, it must first find some other basis to grant jurisdiction. It is fundamental that district courts are courts of limited jurisdiction and possess only those powers which are enumerated in Article III of the Constitution of the United States and any additional powers which Congress may grant to them under the Constitution.

9. If there is no statutory authority to issue the present order, the next possibility is that the Court possessed some "inherent authority" to do so. As to this proposition, the Court of Appeals for the 9th Circuit, *Application of United States*, and 8th Circuit decision decided January 19, 1976, clearly established that the Court, in a non-Title III application, does not have "inherent authority" to issue an order utilizing use of a pen register by FBI authorities. These findings and the other points covered in the prior paragraphs are covered more fully in a memorandum of law which will be submitted.

10. To compel Telephone to actively assist in a criminal investigation when it refused to do so, absent statutory authority, deprives Telephone of its right to refuse without due process of law. Nor can the theory of *posse comitatus* be applied, since this is not a situation where the FBI is seeking aid to keep the peace and it is not in pursuit and

seeking arrest of a *known* law breaker. It is only under those situations where said principle might be applied. It has never been applied to compel private persons (Telephone) to help a law enforcement agency to *investigate* suspected criminals.

11. It must further be noted that if the district court's order of March 19, 1976 is not a "demand of other lawful authority" as required under § 605 Communications Act, then Telephone could be subjected to both civil and criminal liability. For some unexplained reason the Government has decided to proceed with a non-Title III application. It is strange because the crime which is being investigated, namely 18 U.S.C. § 19[52], is one of the crimes enumerated in Title III. If the Government would consent to the vacating of the present order, it could obtain all the information, including the lease lines and technical assistance it desires. Courts in several jurisdictions have affirmed the right of the Government to obtain a pen register when used in conjunction with a wiretap order (Title III). In a good faith effort to resolve this matter expeditiously and without prejudice to either the rights of the FBI, Telephone and/or the public, it is suggested to the Court that the Government proceed by Title III. There appears little reason for the Government to obtain the full wiretap capabilities simply by attempting to obtain a pen register in a non-Title III application. Under a non-Title III application, the Government can circumvent all of the safeguards and requirements of Title III and yet obtain the full capability of wiretapping. Such a procedure certainly is not within the true spirit of the law. Congress intended to protect the Government, Telephone and the public in general by the enactment of Title III. When the Government can utilize Title III, it should be required to do so and not look to cut corners.

12. The issues being presented to this Court are currently pending in a lawsuit before the Court of Appeals, 5th Circuit, *Southern Bell v. United States*. Oral argument was had before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future. In view of the above, the present order raises very substantial legal questions as to the power of this Court to issue said order. I believe it has been demonstrated that in issuing the order of March 19, 1976, the



Court lacked lawful authority to compel Telephone to provide all information, facilities and technical assistance for a pen register and said order should be vacated.

No previous application has been made.

Sworn to before me this  
30th day of March, 1976.

RICHARD H. BYNUM

FRANK R. NATOLI

Order to show cause is necessary since the order has a time limitation of 20 days from March 19, 1976.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

WILLIAM F. McGARTY, being duly sworn, deposes and says:

1. I am employed by the New York Telephone Company (hereinafter referred to as "Telephone") as Security Supervisor. I have served in various capacities for Telephone in the Plant Department, which installs and repairs communication facilities of Telephone. I have been in the Security Division approximately 8½ years where I served as an Investigator for about two years prior to my promotion to Security Supervisor.

2. In my capacity as Security Supervisor, I am primarily responsible for liaison with all law enforcement authorities—local, state and federal. Based upon my experience, I am thoroughly familiar with the functions and use of a device known as a pen register.

3. A pen register is a mechanical device which is physically connected to the telephone line of a subscriber. It records on paper tape all the numbers dialed from the telephone instrument to which it is connected. It will record all such numbers whether or not the call is answered. The electrical impulses emanating from the use of the dial to which a pen register is attached record markings on paper tape which can be translated into the number dialed.

4. In order to install a pen register, it is only necessary to identify the "pair" (twin wires composing the circuit of a telephone line) and the "cable" in which the pair is located at which access to the subscriber's line may be obtained. In addition, it is necessary to identify the location

of "appearances" for such telephone line which are located outside of a subscriber's premises and Telephone's central office. An "appearance", of which there may be several, may be located in the basement of an apartment house, a telephone pole, a rear wall of a building, etc. A pen register may be attached at any of these "appearance" locations.

5. "Leased lines" which are sought in this proceeding are telephone pairs which are made available from one terminal or "appearance" location to another terminal or "appearance" location at a remote place, which remote place can be selected by any person properly ordering leased line facilities. The remote place may be an office, store front, basement, etc., and the leased lines will, of course, transmit any dial pulses or conversation between the two locations as above described.

6. The location of the "appearance", together with the pair and cable information, may be used to eavesdrop and/or install a listening and recording device in such remote places and, with leased lines, eavesdropping and recording may be done at a remote place. It is noted that once a pen register has been installed, a full wiretap "interception" of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit.

7. On March 24, 1976, a copy of an order of this Court, dated March 19, 1976, entered in the above entitled proceeding was presented to Telephone by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice. This order authorized special agents of the Federal Bureau of Investigation to install a pen register on particular telephone numbers in New York City, New York, an area which is serviced by Telephone. Under my supervision Telephone provided the appearance information and/or terminal locations as requested by the agent. We are further willing to provide information concerning the necessary pair, cable and appearance information. This is more fully described in paragraph "6" above. The information which we are willing to furnish is sufficient for the installation of a pen register device and/or the installation of eavesdropping devices. The Federal Bureau of Investigation with the information we are willing to furnish will have the full capacity to install a pen register without

any further assistance of Telephone. However, we are not willing to provide facilities (lease lines) as required by said order.

8. The order which was served on March 24, 1976, directed Telephone to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are being *intercepted*, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates." Clearly, the reading of said order is directing Telephone to provide lease lines which I, after consultation with the Legal Department of Telephone, refused to provide in any manner other than that which I have previously indicated, as described in paragraph "7" above. The order is affirmatively directing Telephone to physically set up the facilities (lease lines) and technical assistance which, I am advised by Telephone counsel, is improper and not under lawful authority.

Sworn to before me this  
30th day of March, 1976

/s/ William F. McGarty  
WILLIAM F. MCGARTY

RICHARD H. BYNUM



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE:

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

*Affidavit*  
Misc. No. 19-97 (44)  
(C.H.T.)

STATE OF NEW YORK  
COUNTY OF NEW YORK  
SOUTHERN DISTRICT OF NEW  
YORK

ss.:

1. I am a Special Attorney of the United States Department of Justice, assigned to the New York Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York, and am in charge of the prosecution of this matter.

2. I make this affidavit in opposition to a motion by the New York Telephone Company to vacate that portion of this Court's Order of March 19, 1976 directing the Telephone Company to furnish facilities and technical assistance (including lease lines) in order to effectuate the installation of a pen register.

3. I have been informed by Special Agent Walter F. Smith of the FBI that the Telephone Company has refused to provide lease lines, which refusal has prevented this investigation from proceeding. The Telephone Company has advised that the FBI should string cables from the subject apartment to another location when a pen register device can be installed.

4. After conferring with Special Agent Smith, it has been concluded that such an operation is unfeasible, and would expose the Government's investigation of the illegal gambling operation. Agent Smith, after conducting surveillances, has advised that if men were observed stringing lines and cables from the subject apartment to another location, the gambling operation would cease to function.

5. Accordingly, based on this affidavit, the affidavit of Special Agent Smith, and the memorandum of law submitted herewith, the motion of the New York Telephone Company to vacate the Court's Order of March 19, 1976 should be denied.

Subscribed and sworn to before me  
this 31st day of March, 1976

/s/ Peter D. Sudler  
PETER D. SUDLER  
Special Attorney  
United States Department  
of Justice

JACOB LAUFER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE  
APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

*Affidavit*  
MISC. No. 19-97 (44)  
(CHT)

STATE OF NEW YORK  
COUNTY OF NEW YORK  
SOUTHERN DISTRICT OF NEW  
YORK

ss.:

Walter F. Smith, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, assigned to the New York City Office, and am in charge of the investigation which is the subject matter of this motion. As such I am familiar with the facts alleged herein.

2. The Federal Bureau of Investigation is presently conducting an investigation into organized criminal activity focusing upon the operation of an illegal gambling business functioning within the Borough of Manhattan. This gambling syndicate operates through the use of a wire room located in an apartment wherein telephone lines are connected. The location of this apartment and the telephone numbers connected thereto are changed on approximately a bi-monthly basis.

3. On March 19, 1976 an order authorizing the use of a pen register or similar mechanical device was signed by the Honorable Charles H. Tenney, United States District Judge. That order directed the New York Telephone Company to furnish forthwith "all information, facilities and technical assistance" necessary to comply with the Court's order.

4. On March 19, 1976 at approximately 2:00 p.m., the affiant proceeded directly from the chambers of Judge Charles H. Tenney to the offices of the New York Telephone Company and attempted to deliver a conformed copy of the

aforementioned order to Leonard Dudden, an employee of the Security Department of the New York Telephone Company, and serving as liason [sic] officer with the Federal Bureau of Investigation in matters requiring the cooperation or assistance of the telephone company. The affiant was informed by the lobby receptionist at the telephone company offices, 1095 Avenue of the Americas, New York, New York, that Leonard Dudden had left the premises and was not available.

5. On March 22, 1976, the affiant was informed by John E. Craig, a Special Agent of the FBI that Special Agent Craig had contacted Leonard Dudden on March 19, 1976 in regard to the leasing of telephone lines in order to suitably install pen registers on telephone instruments in an apartment located on 14th Street in the borough of Manhattan. Special Agent Craig advised the affiant that Leonard Dudden had refused the FBI's request to lease telephone lines on March 19, 1976.

6. From March 20, 1976 up to and including March 23, 1976, the affiant and other Special Agents of the FBI, assigned to this gambling investigation, canvassed the area of 14th Street, New York, New York, in the vicinity of the aforementioned subject apartment, in an attempt to locate a suitable location from which the monitoring of pen registers could be conducted without compromising the investigation. Inasmuch as the buildings immediately adjacent to the apartment building in which the gambling operation is located are abandoned and all windows and doors are sealed with sheet metal, and the fact that prior investigation and interception of wire communication of the operators of this gambling operation discloses that these operators employ countersurveillance techniques thereby precluding the installation of a pen register device or actual lines leading to a pen register device in another location.

7. On March 24, 1976, the affiant delivered a conformed copy of the aforementioned order to Leonard Dudden at 1095 Avenue of the Americas, New York, New York, the offices of the New York Telephone Company. Prior to examining the order, Dudden stated that the leasing of telephone lines in non-title three matters was prohibited by Telephone Company regulations and Dudden therefore refused to comply with the order. In the presence of the affiant,



Dudden gave the aforementioned copy of the order to John Whitman, the Security Manager of New York City-East for the New York Telephone Company. Whitman examined the conformed copy of the aforementioned order and stated that, in accordance with New York Telephone Company policy, he would refuse to comply with the order and therefore would not lease telephone lines to the FBI for this investigation. The affiant requested that this court order be brought to the attention of the legal department of the New York Telephone Company and Whitman stated that the order would be provided to the legal department but that it was also in accordance with instructions from the legal department, and that Whitman was refusing to comply with the order.

WHEREFORE, the affiant respectfully requests that the motion of the New York Telephone Company, seeking to vacate that portion of the Court's order of March 19, 1976 directing the telephone company to provide lease lines, be denied.

/s/ Walter F. Smith  
WALTER F. SMITH  
Special Agent  
Federal Bureau of  
Investigation

Subscribed and sworn to  
before me this 31st day  
of March, 1976.

Jacob Laufer

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE  
APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

MOTION TO STAY  
MISC. No. 19-97 (44)  
(C.H.T.)

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court to stay the order of this Court issued on March 19, 1976, which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials pending its appeal from an order of the Court, dated April 2nd 1976, denying Telephone's Motion to Vacate or Modify said Order.

As grounds therefor Telephone respectfully represents that said Motion to Vacate or Modify the Order directing Telephone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled *Southern Bell v. United States*. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a legitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which had considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved

will have been irrevocably invaded. Their rights can only be protected and the intent of congress preserved by a stay *pendente lite*.

Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

In the alternative Telephone respectfully moves the Court to stay for such time as may be necessary in order for it to apply for a stay to the United States Court of Appeals, for the Second Circuit. The Clerk's office of the Court of Appeals for the Second Circuit advised Telephone that the next date for a hearing of a Motion to Stay is Tuesday, April 6, 1976. Telephone requests a stay until such time as the motion is heard and decided.

GEORGE E. ASHLEY  
Attorney for  
NEW YORK TELEPHONE COMPANY  
1095 Avenue of the Americas  
New York, N.Y.

/s/ Frank R. Natoli  
FRANK R. NATOLI  
Of Counsel

Endorsement:  
Motion denied  
It is so ordered  
Morris E Lasker  
4/6/76 USDJ

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

IN RE

APPLICATION OF THE UNITED  
STATES OF AMERICA IN THE MAT-  
TER OF AN ORDER AUTHORIZING  
THE USE OF A PEN REGISTER OR  
SIMILAR MECHANICAL DEVICE.

MOTION TO STAY

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court for a stay of the Order which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials issued by the United States District Court (SDNY) on March 19, 1976, Tenney, J., pending its appeal to this Court from the Order of Judge Tenney, dated April 2 and filed April 5, 1976, denying Telephone's Motion to Vacate or Modify the March 19, 1976 Order.

As grounds therefor Telephone respectfully represents that:

1. On March 19, 1976, an Order was issued by the United States District Court (SDNY), Tenney, J., directing Telephone to furnish information, facilities and technical assistance to law enforcement officials in connection with the installation and operation of a mechanical devise known as a pen register. A copy of this Order is appended hereto as Exhibit "A".

2. On March 24, 1976, Telephone was served with said Order by a Special Agent of the Federal Bureau of Investigation ("FBI"). Upon receipt of said Order Telephone's Security Office provided the Government Agents with appearance information, but refused to furnish lease lines since Telephone questioned the legal authority of the District Court to order Telephone to provide lease lines and technical assistance in a criminal investigation.

3. On March 25, 1976, Telephone's Legal Department contacted the office of WILLIAM I. ARONWALD, Esq., Attorney in Charge of the Joint Strike Force Against Organized Crime and Racketeers of the United States Department of



Justice and advised the Government that Telephone intended to move to vacate or modify the March 19, 1976 Order. On the following day, March 26, 1976, Telephone's counsel was again in contact with the Government's counsel. By mutual agreement with the Government, Telephone agreed to have its motion papers ready by the early part of the following week. On Monday, March 29, 1976, counsel for Telephone and the Government again had a discussion covering the forthcoming motion. On this date Telephone advised the Government that the Order to Show Cause would be presented on the following day.

4. On March 30, 1976, Telephone promptly filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 Order. Both parties submitted affidavits and memoranda of law on March 31, 1976. Telephone's supporting affidavits and memorandum of law are appended hereto and marked Exhibits "B" and "C". On April 5, 1976, Judge Tenney denied, in all respects, Telephone's motion to vacate or modify the Order. Hereto attached is a copy of that decision marked Exhibit "D".

5. At the time of filing the Order to Show Cause, application was made therein for a Stay pending Judge Tenney's decision. The Stay application was denied on March 30, 1976.

6. In view of the decision denying Telephone's motion, application is herein made to this Court for a Stay pending the appeal. Application to the District Court (Judge Tenney) for a Stay is *not* practicable since Judge Tenney is on vacation and will remain away the entire week. Further, in view of his previous denial for a Stay, it appears unlikely that one would be granted by the District Court. However, time is of the essence in this particular proceeding. It must be further noted that at the time of filing the Order to Show Cause, the Government opposed any Stay pending the decision. Accordingly, Telephone has no alternative but to make its application directly to the Second Circuit for a Stay pending its appeal. In the absence of J. Tenney, formal application for a stay was made to J. Lasker and said Stay was denied. On April 6, 1976, the Government also refused to consent to the Stay.

7. Telephone respectfully represents to this Court that said Motion to Vacate or Modify the Order directing Tele-

phone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled *Southern Bell v. United States*. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

8. Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a legitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which have considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved will have been irrevocably invaded. Their rights can only be protected and the intent of Congress preserved by a stay *pendente lite*.

9. It is important to note that should this motion to stay not be granted, Telephone and its employees face the real dilemma of choosing between civil and criminal liability. If the order directing Telephone's assistance is lawful, interference with its execution by Telephone or any of its employees might be considered contempt of court or a possible violation of 18 U.S.C. §§ 1509, 1510 concerning obstruction of justice. On the other hand, compliance with an invalid order will violate the privacy of telecommunications and subject Telephone and its employees to substantial civil liability under 18 U.S.C. § 2520 and 47 U.S.C. § 605. It is, therefore, important that the validity of the Court's order be determined by the Court of Appeals before Telephone is required to furnish such assistance.

10. Additionally, should this motion to stay not be granted, the pen register authorized by the Order will be completed upon expiration of the twenty day period and Telephone's right to appeal the final order could be denied by the issue presented becoming moot. It is a crucial matter that Telephone's rights, duties and obligations be deter-

mined in this case. To do otherwise will subject Telephone to a continuing pattern of utilization of this procedure by the Government without ever having the issues raised herein decided.

11. It must be emphasized that Telephone's motion to vacate the March 19, 1976 Order is supported by Telephone's deep concern to provide a public service within the guidelines mandated by Congress. It is Telephone's policy, as required by the Communications Act of 1934, to make every effort to ensure and to protect the privacy of telecommunications. In this nature Telephone serves as a public trustee with an extremely high degree of fiduciary duty. Since Congress has granted this protection to the public, it is Telephone's duty and obligation to contest those measures that unlawfully infringe upon it. This case indicates that federal agencies are disposed to continue seeking pen registers by non-Title III applications. It is obvious that the issues posed will continue to arise between the same parties. It is extremely important to the parties herein, as well as the public interest to have this Honorable Court resolve the questions presented. It is the deep concern of Telephone that the public be protected from potentially unwarranted Government intrusion of the privacy of telecommunications.

12. Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

GEORGE E. ASHLEY  
Attorney for  
NEW YORK TELEPHONE COMPANY  
1095 Avenue of the Americas  
New York, New York

/s/ Frank R. Natoli  
FRANK R. NATOLI  
Of Counsel

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

IN RE APPLICATION OF THE  
UNITED STATES OF AMERICA IN  
THE MATTER OF AN ORDER AU-  
THORIZING THE USE OF A PEN  
REGISTER OR SIMILAR MECHANICAL  
DEVICE.

*Affidavit in Opposition  
to Motion for a Stay*

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

PETER D. SUDLER, being duly sworn, deposes and says:

1. I am a Special Attorney with the United States Department of Justice assigned to the New York Strike Force against Organized Crime and Racketeering for the Southern District of New York. I am the attorney in charge of the underlying investigation pursuant to which Judge Tenney issued the March 19, 1976 order authorizing the use of the pen register in question.

2. I make this affidavit in opposition to the motion for a stay of both Judge Tenney's orders of March 19, 1976 and April 2, 1976 directing the New York Telephone Company to furnish information, facilities, and technical assistance (including lease lines) necessary to enable agents of the Federal Bureau of Investigation to install pen registers on two telephones.

3. Aside from relying on the opinion of the District Court (attached hereto as Exhibit A), the government will rely upon its memorandum of law and accompanying affidavits (attached hereto as Exhibit B) submitted to the District Court in opposition to the Telephone Company's motion to vacate the March 19, 1976 order. The government will therefore not repeat, in this affidavit, arguments and recitations of fact made to the District Court which are contained in Exhibit B, but will confine itself to pertinent issues relating solely to the motion now before this Court for a stay.

4. On April 9, 1976, the March 19, 1976 order of the District Court authorizing the use of a pen register will expire.



Assuming that the telephone company's motion for a stay is denied by this Court, the government will then be in the position of having to again go before the District Court to apply for a new order authorizing the use of a pen register. Whether such an order would be granted i[s] a matter of conjecture. It is not known whether probable cause of a sufficiently updated nature would exist to justify a new order. It is not known whether the gambling operation being investigated will still be operating at the same location and over the same telephone lines as those specified in the March 19, 1976 order. It is significant that this gambling operation has a prior history of frequent changes of location and telephone numbers.

5. Accordingly, the government has already been, and will continue to be severely prejudiced, by the actions of the telephone company in refusing to obey the order of the District Court, even if this Court now denies the motion for a stay and eventually affirms Judge Tenney. There could be no better demonstration of the potential for frustration of legitimate law enforcement objectives than allowing the telephone company to pick and choose which Court orders it will obey and which it will not, than this case. By its actions here the telephone company has already brought to a complete halt an ongoing criminal investigation.

6. The most ironical aspect of this case, from the government's view, is the telephone company's position that the utilization of a pen register would result in an invasion of privacy. The device of a pen register, when installed, merely permits discovery of the number of other telephone installations dialed from the instrument to which it is attached. It should be noted that upon the issuance of a grand jury subpoena, the government can obtain toll records of all long distance calls made from any telephone installation. However where, as here, the telephone company does not keep Message Unit Detail service, the government is forced to utilize the pen register device in order to determine what telephones are being called within the Message Unit area. From a commonsense point of view the question may well be asked why, if the government can obtain long distance records by subpoena, should it be required that an order in the nature of a search warrant be obtained to gain access to local toll records? Although the question is probably ir-

relevant since the government here did obtain an order in the nature of a search warrant, thus satisfying all fourth amendment considerations, nevertheless it points out the frivolity of the telephone company's position that a pen register constitutes an invasion of privacy.

7. In conclusion, it is anticipated by the government, that the telephone company will argue that if the stay is denied and compliance with the District Court's order is made, the appeal will become moot. The government contends that if this Court were to deny this motion for a stay, appellate review of the District Court's decision would still be available under the theory that this situation is capable of repetition, yet would evade review. See *Roe v. Wade*, 410 U.S. 113 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

WHEREFORE, it is respectfully requested that the motion for a stay be denied.

/s/ Peter D. Sudler  
PETER D. SUDLER  
Special Attorney  
U.S. Department of  
Justice

Subscribed and sworn to  
before me this 7th day  
of April, 1976.

Steven K. Frankel

76-1155  
A 14

## UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and seventy-six.

In Re:

Application of the United States of America in the matter of an order authorizing the use of a pen register or similar mechanical device.

New York Telephone Company, ("Telephone",)

Appellant.

upon consideration of  
It is hereby ordered that the motion made herein by counsel for the

appellant

~~appellee~~~~intervenor~~~~respondent~~

by notice of motion ~~dated~~ filed April 6, 1976 for a stay pending appeal; for a preference that the motion for a stay

be and it hereby is ~~granted~~ denied and that the motion for a preference be and it hereby is granted.

It is further ordered that appellant shall file a brief and joint appendix on or before April 12, 1976; that the appellee shall file a brief on or before April 16, 1976; that the appeal shall be set for argument on Monday April 19, 1976 before the regular panel sitting and that all parties may file their papers in typewritten form.

A. DANIEL FUSARO

by *Eleanor J. Gussard*  
Senior Deputy Clerk

BEFORE: HON. WILFRED FEINBERGHON. WALTER B. HANSFIELDHON. WILLIAM H. MULLIGAN

Circuit Judges

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

Misc. No. 19-97 (44)

## ORDER

EXTENDING THE TIME FOR USE OF A  
PEN REGISTER

IT IS HEREBY ORDERED that the Order of the District Court (attached hereto as Exhibit A) is amended to extend the period of time for which utilization of the pen register may be made from twenty (20) days to forty (40) days, or upon attainment of the authorized objective, whichever occurs earlier.

Dated: April 9, 1976  
New York, New York

/s/ MORRIS E. LASKER  
UNITED STATES DISTRICT JUDGE



**SUPREME COURT OF THE UNITED STATES**

**No. 76-835**

**United States,**

**Petitioner,**

**v.**

**New York Telephone Company**

**ORDER ALLOWING CERTIORARI. Filed January 25, 1977.**

**The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ..... Circuit is granted.**